IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 81096-6
	)	
v.	)	En Banc
	)	
CHARLES MOMAH,	)	
	)	
Petitioner.	)	
_____	)	Filed October 8, 2009

C. JOHNSON, J.—The Washington Constitution provides in relevant part that an accused has the right to "a speedy *public trial* by an *impartial jury*." Const. art. I, § 22 (emphasis added). This case asks us to determine whether a defendant's constitutional right to a public trial under article I, section 22 was violated when the trial court closed a portion of voir dire to safeguard the defendant's right to a trial by an impartial jury. While our previous article I, section 22 cases have focused on the defendant's right to a public trial, this case implicates both the right to a public trial and the right to an impartial jury. Here, we find the trial court, in consultation with the defense and the prosecution, carefully considered the defendant's article I, section 22 rights, closed the courtroom to preserve his right to an impartial jury, and

narrowly tailored the closure to secure that right. We hold the closure in this case was not a structural error and affirm Charles Momah's conviction.

FACTS

In 2005, Charles Momah, a gynecologist, was charged in King County Superior Court with one count of rape in the third degree, two counts of indecent liberties, and one count of rape in the second degree. These charges arose out of allegations that Momah had sexually violated his patients as he performed physical examinations. The case was scheduled for a jury trial.

Momah's case was heavily publicized, having received extensive media coverage. Due to the significant amount of publicity, a large number of prospective jurors, over 100, were summoned. Tr. of Proceedings on Appeal (TPA) (Oct. 10, 2005) at 3. Based on the jurors' responses to portions of the juror questionnaire, the judge, prosecutor, and defense counsel discussed a list of jurors to be individually questioned. TPA (Oct. 11, 2005) at 5-8, 17-20. Momah's counsel agreed to the private questioning of potential jurors and also argued for the expansion of in-chambers questioning. Defense counsel proposed:

> Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have

> prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

TPA (Oct. 11, 2005) at 4. The prosecutor agreed to the proposal to expand the individual questioning. TPA (Oct. 11, 2005) at 4.

A list of jurors to be individually questioned was then selected, and defense counsel agreed with this list. TPA (Oct. 11, 2005) at 5-6. The group of jurors questioned in-chambers included three general categories: (1) people who indicated prior knowledge about the case, (2) people who asked for private questioning, or (3) people who said they could not be fair. TPA (Oct. 11, 2005) at 27.

Before moving into chambers for private questioning, the judge acted to prevent jurors with knowledge of the case from potentially tainting the rest of venire by explaining the importance of an impartial jury to a fair trial. The trial judge stated:

> It is important for the fairness of the process to both sides that no juror and no individual research any aspect of this case . . . . The case has to be decided on the evidence presented in court . . . . Secondly, it is important that you not talk amongst yourselves about the case . . . . [Y]ou just cannot talk about the case, your views, impressions, because at this point you have not heard any evidence. And you may in the end not even be seated on the jury.

TPA (Oct. 11, 2005) at 16-17. After the court moved into chambers, Momah's counsel actively participated in individual juror questioning regarding prior knowledge of Momah's case and the ability to be fair and impartial. TPA (Oct. 11, 2005) at 19-142. The defense counsel and the prosecution individually questioned about 20 jurors during the morning and then 4 more later that afternoon.[1] TPA (Oct. 11, 2005) at 19-104, 107-42. As a result of the in-chambers voir dire, defense counsel exercised numerous challenges for cause. TPA (Oct. 11, 2005) at 38-48, 59-78, 89-104.

At the conclusion of trial, the jury convicted Momah of all charges. The trial court imposed a standard range sentence of 245 months. The Court of Appeals, Division One affirmed his convictions.

ISSUE

Whether the trial court violated Momah's constitutional right to a public trial?

[1] A review of the record indicates that most of the questions the court and counsel asked jurors concerned their prior knowledge of the case resulting from media publicity.

ANALYSIS

To determine whether the trial court violated Momah's rights, we first review separately the article I, section 22 rights this case implicates: the right to a speedy public trial and the right to an impartial jury.

A. Public Trial Right

Whether the right to a public trial has been violated is a question of law subject to de novo review. *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

Article I, section 10 provides that "[j]ustice in all cases shall be administered openly." The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a "public trial by an impartial jury." These provisions have a commonality: they protect the right to a *public* proceeding.

Our cases have recognized the importance of open proceedings and have emphasized that article I, section 10 secures the public's free and open access to judicial proceedings. We have also stressed that openness of courts is essential to

the court's ability to maintain public confidence in the fairness and honesty of the judicial branch of government. But these principles do not exist in isolation of other constitutional rights and principles.

Article I, sections 10 and 22 serve complementary and interdependent functions in assuring fairness of our judicial system, particularly in the context of a criminal proceeding. Indeed, the central aim of any criminal proceeding must be to try the accused fairly. Thus, the requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of the responsibility and to the importance of their functions. For these reasons, under article I, sections 10 and 22, a strong presumption exists that courts are to be open at all trial stages.

This presumption of openness extends to voir dire because "'[t]he process of juror selection . . . is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). While the right to a public trial

applies to all judicial proceedings, including jury selection, the right is not absolute. The presumption in favor of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest. Thus, the court may close a courtroom under certain circumstances.

To protect the defendant's public trial right under article I, section 22, this court adopted the same standard for closing the court that applies to cases under article I, section 10. *Bone-Club*, 128 Wn.2d at 259. The decisions employing this closure standard for both sections 10 and 22 cases are similar to the analysis applied under the Sixth Amendment and the United States Supreme Court decision in *Waller v. Georgia*, 467 U.S 39, 47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). To determine if closure is appropriate, we apply closure guidelines drawn from *Waller*'s approach. *Bone-Club*, 128 Wn.2d at 259-61; *Orange*, 154 Wn.2d at 805-08. These five guidelines are as follows:

> "1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right *other than an accused's right to a fair trial*, the proponent must show a "serious and imminent threat" to that right.

> "2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> "3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> "4. The court must weigh the competing interests of the proponent of closure and the public.
>
> "5. The order must be no broader in its application or duration than necessary to serve its purpose."

Bone-Club, 128 Wn.2d at 258-59 (emphasis added) (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). After applying these guidelines, the court should enter specific findings on the record to justify the closure.

If, on appeal, the court determines that the defendant's right to a fair public trial has been violated, it devises a remedy appropriate to that violation. If the error is structural in nature, it warrants automatic reversal of conviction and remand for a new trial. An error is structural when it "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'"

Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (alterations in original) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). *Waller* itself establishes that not all courtroom closure errors are fundamentally unfair and thus not all are structural errors; our cases applying *Waller* also support that proposition.

In *Waller*, the trial court closed the courtroom for a suppression hearing over the objections of the defendant, and, on review, the Supreme Court held that the defendant was entitled to a new suppression hearing, but not automatically a new trial. The Court reasoned that "the remedy should be appropriate to the violation," and if it were to automatically grant a new trial without requiring a new hearing, the result would be a "windfall for the defendant" and would thus "not be in the public interest." *Waller*, 467 U.S. at 50. The Court did *not* conclusively presume prejudice and grant automatic reversal of the defendant's conviction and a new trial. Rather, in *Waller*, the Court required a showing that the defendant's case was actually rendered unfair by the closure.

Similarly, in our cases following *Waller*, we have held that the remedy must be appropriate to the violation and have found a new trial required in cases where a

closure rendered a trial fundamentally unfair. For instance, in *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006), we remanded a case for a new trial where the court closed the courtroom, excluding the defendant from a portion of his own trial, while his codefendant made a motion to sever and struck a deal with the State to testify against him. In that case, the closure affected the fairness of Easterling's trial because the court did not seek or receive input or objection from Easterling, and it prevented him from being present during a portion of his own proceedings.

Likewise, in *Orange*, we ordered a new trial because the trial court excluded the defendant's family and friends from voir dire, though defense counsel twice requested that they be present. The closure compromised Orange's right to a fair trial by excluding his family and friends from "'contribut[ing] their knowledge or insight to the jury selection and the inability of venirepersons to see the interested individuals.'" *Orange*, 152 Wn.2d at 812 (emphasis omitted) (quoting *Watters v. State*, 328 Md. 38, 48, 612 A.2d 1288 (1992)); *see also Bone-Club*, 128 Wn.2d 254 (without seeking objection or receiving assent from defendant, court excluded defendant from closed pretrial suppression hearing to protect undercover activities of State's witness); *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) (court

ordered sua sponte closure, without seeking objection or receiving assent from defendant and excluded defendant's family and friends from courtroom due to concerns over space and security).

In the aforementioned cases, the closure errors were held to be structural in nature. Prejudice to the defendant in those cases was sufficiently clear and required the remedy of a new trial. In each case, the trial court closed the courtroom based on interests other than the defendant's; the closures impacted the fairness of the defendant's proceedings; the court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom. *Bone-Club*, 128 Wn.2d at 260 (court held closure a structural error, reasoning in part that "the record lacks any hint the trial court considered Defendant's public trial right"); *Brightman*, 155 Wn.2d at 518 (same); *Orange*, 152 Wn.2d at 811-12 (same). Accordingly, we reversed the convictions and remanded the cases for a new trial.

Applying these principles to this case, we find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure,

argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests. Where, as here, a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate.[2]

B. Impartial Jury

Under article I, section 22, the accused is entitled to a "public trial by an *impartial jury*" (emphasis added). The right to a public trial and the right to an impartial jury are two interrelated but distinct rights. As described above, article I, section 22's "public trial" right, like article I, section 10's right of the public to open proceedings, focuses on the *public* nature of a defendant's fair trial right. The

[2] In order to facilitate appellate review, the better practice is to apply the five guidelines and enter specific findings before closing the courtroom.

"impartial jury" aspect of article I, section 22, focuses on the defendant's right to have unbiased jurors, whose prior knowledge of the case or their prejudice does not taint the entire venire and render the defendant's trial unfair. Indeed, an essential element of a fair trial is an impartial trier of fact – a jury capable of deciding the case based on the evidence before it. Thus, voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a

fair and impartial jury through juror questioning.

On the one hand, Momah had a right to have openness where the public and jurors could hear every part of the proceedings, ensuring the fairness of his trial process. On the other, Momah had a right to an impartial jury, wherein no juror's prejudice or prior knowledge would compromise the fairness of Momah's trial process. One right privileges openness, while the other may necessitate closure.

As we have stated in instances where article I, sections 10 and 22 were in conflict: we must harmonize the right to a public trial with the right to an impartial jury. *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 61, 615 P.2d 440 (1980). In *Kurtz*, a newspaper sought both to gain access to a pretrial suppression hearing and an injunction barring the trial judge from excluding it from other aspects of a trial in a highly publicized murder case. In that case, this court held the trial judge struck the proper balance between the defendant's right to an impartial jury and the public's right of access by closing the courtroom, and we denied the requested relief. We reasoned in part that given the difficulty of effacing pretrial publicity from jurors' minds, trial courts must take appropriate measures to ensure that the balance is never weighted against the accused.

In the present case, we must also balance the article I, section 22 rights at issue. To achieve the proper balance, we construe those rights in light of the central aim of a criminal proceeding: to try the accused fairly. Further, to ensure that a criminal defendant receives a fundamentally fair trial, we permit the accused to make tactical choices to advance his own interests and ensure what he perceives as the fairest result. In our adversarial system, these are basic rights of the accused. Accordingly, the choices a party makes at trial may impact their ability to seek relief from an alleged error or may affect the remedy they receive.

In some cases, courts have used the invited error doctrine to analyze the impact a party's tactical choices have on alleged error. The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). Different factors have led courts to conclude that the alleged error merits denial of relief under this doctrine.

In *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002), we found the

invited error doctrine applicable where a defendant proposed a jury instruction based on an ordinance that was later declared unconstitutional. In *Patu*, the defendant proposed an instruction that was missing an essential element of the crime, the court accepted the instruction, and the jury convicted the defendant. On appeal, the defendant sought reversal of conviction based on the trial court's failure to include an essential element of the offense in the instruction. We affirmed the conviction and held the invited error doctrine applied, reasoning that a party may not request an instruction and later complain on appeal that the requested instruction was given. *See also State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999) (holding invited error doctrine applicable to defendants who proposed erroneous instruction without attempting to add remedial instruction and reasoning, although error was of constitutional magnitude and presumed prejudicial, defendants invited error and could not complain on appeal). In determining whether the invited error doctrine was applicable, courts have also considered whether a defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *See, e.g., State v. LeFaber,* 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J., dissenting) (considering distinction between defendant's failure to object to error

and affirmatively assent to error); *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (considering whether defendant materially contributed to error); *People v. Thomson*, 50 Cal. 3d 134, 157, 785 P.2d 857, 266 Cal. Rptr. 309 (1990) (considering whether defendant benefited from closure).

While *Momah* does not present a classic case of invited error, the doctrine and the factors courts have used in cases applying it are helpful for the purposes of determining the appropriate remedy in this case. In harmonizing the defendant's rights under article I, section 22, we consider Momah's tactical choices and apply the basic premise of the invited error doctrine to determine what, if any, relief should be granted.

Momah asserts that his failure to object does not constitute a waiver of his public trial right such that he is prohibited from raising this issue for the first time on appeal and seeking a new trial. While Momah is correct in terms of the ability to raise the issue, in none of the cases cited as support do the defendants affirmatively advocate for closure, argue for the expansion of the closure, and benefit from it. *See, e.g., Easterling*, 157 Wn.2d 167 (defendant denied opportunity to object and was not permitted to participate in closed hearing on codefendant's motion to

sever); *Bone-Club*, 128 Wn.2d 254 (defendant denied opportunity to object and was not permitted to participate in the closed pretrial suppression hearing). Momah's situation is distinguishable from that of other defendants in closure cases. Additionally, being able to raise an issue on appeal does not automatically mean reversal is required.

From the outset of trial, we presume Momah made tactical choices to achieve what he perceived as the fairest result. Before in-chambers voir dire began, defense counsel, the prosecution, and the judge discussed numerous proposals concerning the juror selection. TPA (Oct. 6, 2005) at 67-91; TPA (Oct. 10, 2005) at 4-7; TPA (Oct. 11, 2005) at 1-18. Although Momah was provided the opportunity to object to the in-chambers proposal, he never objected. Further, he gave no indication that a closed voir dire might violate his right to public trial. To the contrary, defense counsel made a deliberate choice to pursue in-chambers voir dire to avoid "contamination" of the jury pool by jurors with prior knowledge of Momah's case. Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning. As a result of this closure and defense counsel's active participation in the questioning,

Momah was able to exercise numerous challenges for cause, removing biased and partial jurors from the venire. We find all of these actions by Momah's counsel and the trial judge occurred in order to promote and safeguard the right to an impartial jury.

As we stated above, courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrates that the trial court recognized the competing article I, section 22 interests in this case. The court, in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure

was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it. Thus, the underlying facts and impact of the closure in *Momah* are significantly different from those presented by our previous cases. Reversal of Momah's conviction and remand of his case cannot be the remedy under these circumstances. We affirm the jury's determination of guilt.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst

Justice Barbara A. Madsen

Justice James M. Johnson

Joel M. Penoyar, Justice Pro Tem.